

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

FEDERAL TRADE COMMISSION

I N D E X

INTRODUCTION

PAGE

BY MS. ROBBINS

4

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

FEDERAL TRADE COMMISSION

IN THE MATTER OF:) Matter No :
CAN-SPAM REPORT TO CONGRESS.) P044405
-----)

THURSDAY, FEBRUARY 3, 2005

Room 238

Federal Trade Commission

600 Pennsylvania Avenue, N.W.

Washington, D.C. 20580

The above-entitled matter came on for meeting,
pursuant to agreement, at 3:05 p.m.

1 APPEARANCES:

2

3 ON BEHALF OF THE FEDERAL TRADE COMMISSION:

4 COLLEEN ROBBINS, ESQ.

5 ALLYSON HIMELFARB, INVESTIGATOR

6 LOU SILVERSIN, ATTORNEY

7 600 Pennsylvania Avenue

8 Washington, D.C. 20058

9

10 ALSO PRESENT:

11 STUART INGIS, Piper Marbury

12 JENNIFER JACOBSEN, Time Warner

13

14 ALSO PRESENT VIA TELEPHONE:

15 BETSY BRADY, MICROSOFT

16 HARRY KATZ, MICROSOFT

17 AARON KORNBLUM, MICROSOFT

18 BILL ASHWORTH, MICROSOFT

19 MAGGIE MANSOUVKIA, MCI

20

21

22

23

24

25

P R O C E E D I N G S

- - - - -

MS. ROBBINS: We have a court reporter here, as you know, and so I'm just going to go through a little formality in the beginning, just for the record.

Today is Thursday, February 3, 2005, and it is approximately 3:10 p.m., and we are meeting today with representatives from several Internet services providers to discuss labeling of commercial Email or the possible labeling of commercial Email.

My name is Colleen Robbins, and I'm an attorney here with FTC's Division of Marketing Practices, and I'm here today with Allyson Himelfarb, who is an investigator with the Division of Marketing Practices, and Lou Silversin, who is an economist in our Bureau of Economics.

And so I would like to just go through the folks who are here, and if you could just state your name and affiliations for the record, and we'll start here in the room with Stu.

MR. INGIS: Stu Ingis, DLA Piper Rudnick Gray Cary here with Time Warner for AOL.

MS. JACOBSEN: I'm Jennifer Jacobsen. I'm with Time Warner public policy office.

MS. ROBBINS: Betsy, do you want to start with

1 you on the phone?

2 MS. BRADY: Betsy Brady, policy counsel here in
3 Microsoft's Washington office.

4 MS. ROBBINS: Go ahead.

5 MR. KATZ: Harry Katz, I'm a program manager in
6 Microsoft's safety technology team based in Redmond,
7 Washington.

8 MR. KORNBLUM: This is Aaron Kornblum. I'm the
9 Internet safety enforcement attorney at Microsoft based
10 in Redmond, Washington.

11 MR. ASHWORTH: I'm Bill Ashworth, public policy
12 office, Microsoft, based in Redmond, Washington.

13 MS. ROBBINS: Anyone else on the line?

14 MS. MANSOUVKIA: Maggie Mansouvkia, senior
15 counsel with MCI's Internet and ECommerce group.

16 MS. ROBBINS: Great. Well, to get started, your
17 statements here may be cited in our report to Congress,
18 and that is why we have our reporter here today.

19 So before Can-Spam was enacted, there were
20 approximately 16, I believe 16 states that had an ADV
21 labeling requirement, and so my first question is: Did
22 you filter or did the ISPs filter based on that label
23 when those laws were in effect or was that just one
24 factor that went into the filtering process?

25 MS. JACOBSEN: AOL has not filtered based on ADV

1 labeling.

2 MS. ROBBINS: For those of you on the phone, if
3 you would just identify yourself before speaking because
4 that way the court reporter will know who is talking.

5 MS. MANSOUVKIA: Unless someone else on the
6 phone knows it, I will answer for MCI and say that I'm
7 not sure if we filtered or not, and we're going to have
8 to get back to you on that Colleen.

9 MS. ROBBINS: Do any of you have a sense of how
10 effective the ADV labeling was when the state laws were
11 in effect?

12 MS. MANSOUVKIA: Maggie Mansouvkia. Because
13 we're mostly on the wholesale side, we do not filter
14 based on ADV labeling, and in preparation for our
15 comments today, we've done research and done many
16 inquiries of those who did have this law, and we were
17 not able to come up with any information that there was
18 any reduction of spam or any reduction in the complaints
19 that we received or anything from the states themselves
20 who had implemented this law that indicated ADV labeling
21 was effective.

22 MS. ROBBINS: Does that mean that you just
23 didn't get any information from them, or did you
24 actually receive affirmative information that there was
25 no effect?

1 MS. MANSOUVKIA: No, we didn't receive any
2 information from them.

3 MS. ROBBINS: Okay.

4 MS. MANSOUVKIA: Within our internal Internet
5 abuse team, we got affirmative information that there
6 was no reduction in the complaints that we received
7 based on ADV.

8 MS. ROBBINS: Okay.

9 MS. MANSOUVKIA: That had ADV in the subject
10 line.

11 MS. ROBBINS: Did your abuse team see that
12 people actually followed the ADV then, that the ADV
13 actually showed up in the Emails or just that people
14 complained that they were getting mail that did not have
15 the ADV label?

16 MS. MANSOUVKIA: Well, in looking at the subset
17 of Emails that we received complaints on, some of them
18 had the ADV label, and the majority did not.

19 MS. ROBBINS: Okay.

20 MS. MANSOUVKIA: But in the overall number,
21 there was no indication that there was any reduction in
22 complaints. That's not to say that we looked at every
23 ADV Email, ADV labeled Email, because that's not how our
24 Internet team works. They just basically follow up on
25 complaints that we get.

1 MS. ROBBINS: Do any of you currently see ADV in
2 the subject lines of messages now, even though it's not
3 technically a requirement?

4 MR. KATZ: This is Harry Katz from Microsoft.
5 From my own personal mailbox and experience, what I see
6 more often is ADV put in the subject line actually by
7 spam filters rather than by the original senders, or at
8 least that's how it appears to me.

9 MS. ROBBINS: Is that part of the software from
10 the filtering process?

11 MR. KATZ: Yes, I believe there are some spam
12 filters out there that did that kind of thing and
13 possibly some service providers do that as a benefit, if
14 you will, for their subscribers.

15 MR. SILVERSON: This is Lou Silverson. Can I
16 ask you to clarify? Would that label be inserted just
17 for spam or would it be inserted for all commercial
18 Email?

19 MR. KATZ: That's a very good question, and I
20 don't know the answer but I suspect it would vary from
21 one software product to another.

22 MR. SILVERSON: Okay. Thank you.

23 MR. KATZ: The only reason I raised the point is
24 just to draw attention to the fact that the ADV prefix
25 can be inserted into the subject line in a sense

1 anywhere along the path that a message traveled, whether
2 it be by the original sender or by an ISP acting on
3 their behalf or by filtering software that is used at
4 the user's desktop, and the users themselves have no way
5 of telling at which point that insertion occurred.

6 MR. SILVERSTEIN: I understand.

7 MS. ROBBINS: Do you think that a subject line
8 label would make it easier or more likely for an ISP to
9 filter out unwanted messages?

10 MS. JACOBSEN: From AOL's perspective, we do not
11 think it would make it any easier, and that is for a
12 couple of reasons. The main one is that a large
13 proportion of the spam that we see coming over our
14 network is from spammers who engage in fraud and
15 falsification and are not going to be people who will
16 follow an ADV requirement, and so while we may be able
17 to identify marketers sending legitimate Emails, it
18 doesn't help us filter out the spam that most people are
19 complaining about.

20 MS. ROBBINS: Okay.

21 MS. MANSOUVKIA: That's exactly the same from
22 MCI's viewpoint.

23 MR. KATZ: I think at Microsoft we concur with
24 that as well. Harry Katz again, if I can add another
25 point. I think we see that filtering technology has

1 evolved quite a bit in the last year or two, and that
2 I'm not at this point convinced that having a subject
3 label prefix would actually really provide that much
4 additional benefit to filters. We already are catching
5 a fair amount of spam. We think we're catching the
6 majority of spam. We know there's stuff that we're not
7 catching, but I don't think that an ADV label would
8 improve the effectiveness of filters, which have already
9 improved incredibly.

10 MS. ROBBINS: Do you think though that even if
11 it doesn't improve the effectiveness of filters, that it
12 might improve consumer's ability to filter on the
13 consumer end?

14 MR. KATZ: No, I don't, for the reason that the
15 person Jen Jacobsen from AOL pointed out, that much of
16 the spam is fraudulent and wouldn't comply with such a
17 requirement.

18 MS. ROBBINS: Okay. So I guess that brings me
19 to my next question: Who do you think would actually
20 comply with this type of labeling requirement?

21 MS. JACOBSEN: I think legitimate marketers who
22 are already abiding by the other existing requirements
23 of Can-Spam would be likely to comply with an ADV
24 labeling requirement. These are the people who
25 generally, however, we don't have problems with.

1 If there are complaints that come in about a
2 legitimate marketer, there are a variety of tools on the
3 technology side and even in the consumer's hands to fix
4 those problems, so it's not a necessary tool we don't
5 think. For legitimate marketers who may make mistakes
6 or generate complaints, there are ways already of
7 dealing with those issues.

8 MS. ROBBINS: So you don't think that there's an
9 added benefit or value for those marketers to add an ADV
10 label?

11 MS. JACOBSEN: Not particularly, no.

12 MS. ROBBINS: Okay. Anyone else want to answer
13 that or add to that?

14 MS. BRADY: I think Jen stated it beautifully.

15 MR. INGIS: For the record.

16 MS. ROBBINS: If there was a labeling
17 requirement, what do you see happening then to the Email
18 from spammers who don't comply with the requirement? Do
19 you think that there would be heightened filtering of
20 those types of Emails, or do you think those Emails may
21 tend to get through more easily if they're not labeled?

22 MS. JACOBSEN: I would say -- and I would have
23 to check with our technical people for a more educated
24 response, but from my conversations with them, I would
25 tend to think it would have no impact either way on the

1 fraud spam that comes through. I don't think more or
2 less of it would come through.

3 MS. ROBBINS: Okay.

4 MR. KORNBLUM: This is Aaron Kornblum with
5 Microsoft. In our enforcement work, we have seen a
6 large amount of spam coming through without, for
7 example, the proper pornographic or sexually explicit
8 labeling requirements that the Commission set in place
9 in May.

10 I agree, I don't think that everyone who is
11 sending the mail would comply, that spammers who are
12 trying to penetrate filters would not label their mail,
13 and it would not have a significant impact.

14 MS. ROBBINS: Aaron, I want to ask you this next
15 question: Do you think that having a label would make
16 enforcement actions any easier to bring?

17 MR. KORNBLUM: No, not significantly. We
18 collect quite a bit of spam and look through it for
19 actionability for mail that does not comply with
20 Can-Spam. We do look for mail that does not comply
21 with, for example, the sexually explicit labeling
22 requirements. We find quite a bit that does not.

23 We find some that does, but labeling commercial
24 mail with an ADV I don't think would create -- it would
25 not enhance our ability to target mail necessarily. I

1 think that mail can still be actionable under Can-Spam
2 if it has -- say that if a labeling requirement were to
3 go in effect, it would potentially be actionable for
4 other reasons.

5 I'm not an expert on the filtering. I can see a
6 label empowering consumers to sort mail or to perhaps
7 place it into buckets more efficiently based on a label,
8 but I expect from our enforcement experience that some
9 commercial mail would not be properly labeled, and being
10 labeled or not labeled would not per se make our
11 targeting or enforcement efforts more effective.

12 MS. ROBBINS: Does anyone see any technical
13 disadvantages to subject line labeling? Is there any
14 technical disadvantage to having something inserted into
15 the subject line?

16 MR. KATZ: This is Harry Katz. There can be, if
17 you will, an inconvenience factor when you change the
18 subject line for end users, and this may not occur in
19 the specific case of ADV labeling, but in general, as
20 you know from using Email, your mail user program, your
21 client program is able to sort mail on the basis of the
22 subject line or on the basis of a conversation of an
23 original message and replies usually with the same
24 subject line.

25 If the subject line is changed, that ability to

1 sort the mail in that way can be disrupted, so in
2 general, changing the subject line is something that
3 needs to be done with care.

4 Now, I suppose the mitigating factor here is
5 that it's unlikely anybody is going to be in a
6 conversation with anybody doing this sort of
7 advertising, but there is that concern, that changing
8 the subject line can alter the user's experience.

9 MS. ROBBINS: Okay.

10 MS. MANSOUVKIA: This is Maggie. I think along
11 the same lines, I'm not sure we referred to this example
12 I'm about to provide as a technical disadvantage, but
13 certainly because of the stigma of an ADV label, I think
14 those organizations who would be complying with a
15 labeling requirement, which are legitimate marketers,
16 would have a lot more of their Email get lost in the
17 shuffle, because even though a consumer has indicated
18 they want to do business with that organization and they
19 want to receive offers or discounts or whatever it is
20 from the organization, an ADV label essentially, either
21 because of the way their own filter is set up or how
22 they go through and organize their Emails, would make it
23 much more likely for a consumer to weed out certain
24 Emails, and certainly the ones with an ADV label without
25 even looking at them, even though they indicated they

1 wanted to be looking at them.

2 MS. ROBBINS: So you think that there could be a
3 higher rate of false positives?

4 MS. MANSOUVKIA: What do you mean by a higher
5 rate?

6 MS. ROBBINS: Or a higher incidence of false
7 positives then? I'm not sure if that's what you meant.

8 MS. MANSOUVKIA: You mean as far as filters?

9 MS. ROBBINS: In terms of what the consumers
10 will receive.

11 MS. MANSOUVKIA: Oh, I see what you're saying.
12 So, in other words, a higher rate of spam that they can.

13 MR. SILVERVIN: Maggie, this is Lou Silvervin.
14 Can I just ask you something about that? I thought
15 about that, too, and it strikes me that that would be
16 because people wouldn't really understand that the ADV
17 label is coming attached to commercial mail that's not
18 spam, that that similar effect would happen because
19 people misperceive what the label really does.

20 And I found myself wondering would that effect
21 -- over how long would it take people to understand that
22 it wasn't doing what they thought it was doing?

23 MS. MANSOUVKIA: You know, I'm not sure how long
24 it would take people to understand that. I think
25 dealing with all Emails or certain Emails I should say

1 as just outright advertisement is different from
2 Emails -- I'll give you an example of what I receive in
3 my inbox myself, which is an offer from United as to
4 what low price airfares are or offers from stores that I
5 deal with about particular sales that are going on over
6 a particular week or something to that effect.

7 Those are the types of things consumers want to
8 get, but at the same time they're the exact same Emails
9 who would automatically have an ADV label on them
10 because they would be from organizations that would have
11 to be complying.

12 MR. SILVERSIN: Right. But why does an ADV
13 label make it less likely that you would open the mail?

14 MS. MANSOUVKIA: I think the label would still
15 make it very much most likely that I would open the
16 Email.

17 MR. SILVERSIN: Even if you understood that the
18 label essentially didn't mean anything?

19 MS. MANSOUVKIA: I'm not sure that a consumer
20 would take it that way. I mean, if I knew to expect
21 that ADV label, and over time I'm sure people would come
22 to expect it, that's one thing, but at the same time
23 you're getting Emails which don't have that ADV on them.
24 I'm not sure that anyone is familiar enough with the law
25 to know that it's the difference between an organization

1 that's in full compliance versus one who is essentially
2 ignoring the law.

3 MR. SILVERSIN: Okay. So would it be fair to
4 say that you see literally no benefit and perhaps a
5 substantial transition cost if the thing were phased in?

6 MS. MANSOUVKIA: Yes, that's right.

7 MR. SILVERSIN: Okay. Thank you.

8 MS. ROBBINS: Does anyone have any thoughts on
9 any alternatives to subject line labeling? No?

10 MS. MANSOUVKIA: Alternatives in what way, to
11 point out that they're commercial messages?

12 MS. ROBBINS: That or something like that or
13 maybe with reputation services or accreditation services
14 or something like that that may be more useful to
15 consumers or useful to ISPs in terms of filtering. I
16 don't know. That's why I'm asking.

17 Do you think that there are other alternatives
18 that might get at the same heart of why subject line
19 labeling is an issue?

20 MR. KATZ: This is Harry Katz. There have been
21 a number of other approaches to mail labeling and mail
22 classification, the most common of which would be to
23 insert some kind of classification in a header line in
24 the message, and so this information would travel with
25 the message but would be invisible to the user.

1 MS. ROBBINS: So another header, a second
2 header?

3 MR. KATZ: That's correct. You might just call
4 it message classification header or something like that,
5 but all of these proposals are subject to essentially
6 the same issues that we've just been discussing here,
7 and that is that it's effectively up to the sender to
8 comply with the law, and thus far we haven't really seen
9 any indication that spammers and phishers are likely to
10 do that.

11 So the only real benefit of, if you will, hiding
12 the classification tag inside an invisible header is
13 that it doesn't appear to be visible to the user, and
14 maybe filtering software could act on it, but as we said
15 we don't think that's going to improve the
16 effectiveness.

17 So when you move beyond labeling into things
18 like reputation and accreditation services, what we're
19 trying to do there is I think something slightly
20 different, but in the long run we believe it's more
21 effective, which is rather than attempt to classify the
22 message itself, can we classify the sender of the
23 message based upon their past behavior?

24 That's what reputation and accreditation systems
25 are all about, and that's the approach that we think

1 will be far more promising.

2 MS. ROBBINS: Is that because labeling is more
3 restrictive or more static as opposed to accreditation
4 or reputation, which is somewhat evolving?

5 MR. KATZ: There are a number of reasons. I
6 think the first reason is that a label, if you will, is
7 affixed to a message by the sender, and fundamentally,
8 we don't trust most senders, so we're probably not going
9 to trust any label they affix to their messages whereas
10 a reputation system is built upon data that's
11 accumulated from a variety of sources, in fact,
12 encapsulates or summarizes the growth or overall mail
13 sending patterns of a given sender, and that's something
14 that the sender has much less control over in the sense
15 of being able to fraudulently influence their own
16 reputation because it's data that's collected from all
17 over the place, from people who have complained about
18 the mail, from a variety of sources.

19 MR. SILVERSTEIN: Can I just interrupt? Don't
20 these spammers change their identities all the time?
21 How realistic is it that you can pick them out?

22 MR. KATZ: That's an excellent point, and I
23 think that the fact that they change their identities
24 all the time is, in fact, a good clue that they're
25 spammers. If you take a look at organizations like

1 Amazon.com or EBay or Washington Mutual Bank, these are
2 large reputable organizations that do not change their
3 behavior. They do not change the locations from which
4 they send mail, and that is a very significant clue to
5 the fact that they are legitimate.

6 MR. SILVERVIN: How would you differentiate
7 someone who has changed from someone who just happens to
8 be a new entrant?

9 MR. KATZ: So a new entrant might start off with
10 a relatively neutral reputation, and then over time
11 would, if you will, earn a positive reputation based
12 upon good mail behavior. It's exactly like a high
13 school graduate applying for their first credit card.
14 They don't have a credit rating, and so VISA or
15 MasterCard gives them maybe a \$500 limit.

16 MR. SILVERVIN: Then where would you tell that
17 the bad fellow has changed his identity? As you can see
18 that here are two mails, one from last week, one from
19 this week, they're about the same type of thing. There
20 are similarities between them but the identity has
21 changed. Is that the sort of thing you mean?

22 MR. KATZ: There are a number of ways of doing
23 it, and we could have a conversation for quite a length
24 of time about how these things are done, and in fact
25 there's more than one way of creating reputation

1 systems, and these things are, in fact, relatively new
2 and evolving, but fundamentally we track the behavior,
3 and what's really the indicator is a new entrant
4 suddenly sending a huge volume of mail.

5 MR. SILVERSIN: Ah, okay. I see. That's
6 useful.

7 MR. KATZ: So essentially --

8 MR. SILVERSIN: So what you have is a predictive
9 model that can tell you how likely it is that it's spam.

10 MR. KATZ: I'm not sure we could call it a
11 predictive model but certainly we are trying to, yes --
12 we're trying to use past behavior as a way to -- as a
13 way to judge mail that we're currently receiving.

14 MR. SILVERSIN: Okay.

15 MS. ROBBINS: Lou, do you have any other
16 questions?

17 MR. SILVERSIN: Just one. I wanted to get back
18 to this cost issue and ways in which this label might
19 actually make things more difficult, and one thing that
20 I wondered, I'll just sort of spit it out and then ask
21 if anybody knows anything about this. It may be that
22 there are Email filtering programs out there that are
23 set up to filter on an ADV label, perhaps because they
24 came preset that way or perhaps because some people set
25 them up that way in response to publicity of the various

1 state laws, and they really haven't had much effect
2 because so little mail has concern with the label but
3 might have the costs that we were discussing a couple
4 minutes ago, and I'm wondering if anybody on the line
5 knows anything factual about that.

6 I'm just speculating.

7 MS. ROBBINS: To sort of ask maybe a related or
8 different cost question: Is there a cost issue or
9 differentiation between sending an Email with a tag in
10 the subject line as opposed to sending what Harry was
11 describing, about having a separate tag in another
12 header? In terms of cost coming into your servers, is
13 there a cost issue there at all where you may be able to
14 filter based on I guess the subject line or filtering
15 based on another header?

16 MR. KATZ: Are you referring to computational
17 costs or other costs?

18 MS. ROBBINS: Yes, computational costs.

19 MR. KATZ: No, the location of the label would
20 not influence cost.

21 MS. ROBBINS: Okay.

22 MR. SILVERSON: Okay. I guess I don't have
23 anything else, Colleen.

24 MS. ROBBINS: I actually don't have any other
25 questions either. Does anyone else have any other

1 comments they want to make before we end?

2 No? Well, I know this was short. I really
3 appreciate you all making the time to meet with us and
4 speak with us on this issue, and thank you very much.

5 (Whereupon, at 3:38 p.m the meeting was
6 concluded.)

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATE OF REPORTER

DOCKET/FILE NUMBER: P044405
CASE TITLE: CAN-SPAM MEETINGS
HEARING DATE: FEBRUARY 3. 2005

I HEREBY CERTIFY that the transcript contained herein is a full and accurate transcript of the steno notes transcribed by me on the above cause before the FEDERAL TRADE COMMISSION to the best of my knowledge and belief.

DATED: FEBRUARY 10, 2005

DEBRA L. MAHEUX

CERTIFICATION OF PROOFREADER

I HEREBY CERTIFY that I proofread the transcript for accuracy in spelling, hyphenation, punctuation and format.

DIANE QUADE